The appeal is accordingly allowed with costs, and the application of the appellants to set aside wholly the ex parte order of 28 March 1990 must therefore be allowed.

Appeal allowed.

Solicitors: *Cheang & Ariff; Riza Leong & Partners.*

Reported by *Prof Ahmad Ibrahim*

Selvamary v Rethinasamy

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-196-1989
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
19 NOVEMBER 1990

Legal Profession — Complaint against solicitor to Bar Council — Bar Council deciding formal inquiry not necessary — Appeal to High Court — Appeal out of time — Whether Bar Council ought to be cited as a party — Legal Profession Act 1976, s 103

Civil Procedure — Parties — Complaint against solicitor to Bar Council — Bar Council deciding formal inquiry not necessary — Appeal — Whether Bar Council ought to be cited as a party — Legal Profession Act 1976, s 103 — Rules of the High Court 1980, O 15 r 6(2) & O 53

The appellant in this case had made a complaint against the respondent, a solicitor, over an alleged impropriety while acting as a solicitor for her in a sale and purchase agreement. The Bar Council decided that a formal enquiry into her complaint was not necessary. The appellant then filed an originating summons to appeal against the decision of the Bar Council. The respondent raised a preliminary objection (a) that the Bar Council should have been but was not cited as a party to the proceeding and (b) the period for appealing had expired. The learned judge upheld the preliminary objection on both points. The appellant appealed.

Held, allowing the appeal in part:

(1) There is no doubt that the action in the present case is properly constituted and the non-citing of the Bar Council does not affect the validity of the action. The appeal on the first issue is accordingly allowed.

(2) Since the time limited for appealing had long since expired the appeal was not properly before the court. The appeal against the second issue is dismissed.

[Bahasa Malaysia summary

Perayu di dalam kes ini telah membuat aduan terhadap responden, seorang peguam, atas apa yang dikatakan kelakuan salahnya apabila bertindak sebagai peguam bagi perayu didalam urusan perjanjian jual beli tanah. Majlis Peguam telah memutuskan tidak perlu diadakan siasatan lebih lanjut mengenai aduan itu. Perayu kemudiannya menfailkan saman pemula untuk merayu dari keputusan Majlis Paguam itu. Responden telah membawa bantahan permulaan (a) bahawa Majlis Peguam seharusnya akan tetapi telah tidak dinamakan sebagai pihak didalam prosiding itu; (b) masa untuk membuat rayuan telah tamat. Hakim yang arif telah membuat keputusan membenarkan bantahan permulaan itu atas dua-dua perkara itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan sebahagian dari rayuan itu.

(1) Tidak syak lagi tindakan yang dibuat didalam kes ini adalah dibuat dengan sewajarnya dan perkara tidak menamakan Majlis Peguam tidak menjejas kesahan tindakan itu. Rayuan atas issue pertama oleh kerana itu hendaklah dibenarkan.

(2) Oleh kerana masa yang diperuntukkan untuk rayuan telah lama tamat rayuan itu tidak dibawa dengan sempurna ke Mahkamah Rayuan dan rayuan atas issue kedua hendaklah ditolak.]

Cases referred to

1 *Dollfus Mieg et Compagnir SA* v *Bank of England* [1951] 1 Ch 33 (folld)
2 *McCheane* v *Gyles (No 2)* [1902] 1 Ch 911 (refd)
3 *Moser* v *Marsden* [1892] 1 Ch 487 (refd)
4 *Pegang Mining Co Ltd* v *Choong Sam & Ors* [1969] 2 MLJ 52 (refd)
5 *Wilson* v *Church* (1878) 9 Ch D 552 (refd)
6 *Yii Suok Ting* v *Sibu Municipal Council* [1986] 1 MLJ 232 (refd)
7 *Squibb United Kingdom Staff Association* v *Certification Officer* [1979] 2 All ER 452 (refd)

Legislation referred to

Legal Profession Act 1976 s 103

GS Nijar (*M Thayalan* with him) for the appellants.
RJ Manecksha for the respondent.
PR Manecksha (*Tuan Haji Sulaiman* with him) holding watching brief for Bar Council.
G Sri Ram holding watching brief.

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): Before the learned judge of the High Court was an appeal under s 103 of the Legal Profession Act 1976 ('LPA'). The appellant was the complainant who had made a complaint under s 95 of the LPA against the solicitor (the respondent here) over an alleged impropriety while acting as solicitor for her in a sale and purchase agreement. The Bar Council however decided that a formal enquiry into her complaint was not necessary. The appellant then filed the originating summons pursuant to s 103(2) of the LPA.

Section 103 of the LPA reads as follows:

Appeal to High Court

(1) A person who has made a complaint under section 95(1) and who is dissatisfied with the findings of the State Bar Committee or of the Inquiry Committee or with the determination of the Bar Council on the complaint may, within fourteen days of receiving the notification under section 98(c), appeal to a Judge of the High Court against such finding or determination or both.

(2) The appeal shall be by way of originating summons and shall be accompanied by an affidavit of the facts constituting the basis of the complaint and by a copy of the complaint originally made to the Bar Council, together with a copy of the notification mentioned in section 98(c).

(3) A copy of each of the documents referred to in subsection (2) shall be served on the Bar Council.

At the outset of the proceeding before the learned judge of the High Court the respondent raised a two-pronged preliminary objection — firstly, that the Bar Council whose decision was the subject of the appeal should have been but not cited as a party to the proceeding which omission was said to be fatal to the action; and secondly, since the period for appealing had long expired the appeal was incompetent and ought to be dismissed in limine.

The answer of the appellant to the first point was simply that according to s 103(3) of the LPA the Bar Council need only be served but not cited as a party and the omission was at its worst a non-joinder and not fatal to the action. The appellant's answer to the second point was that the appeal had under the circumstances already been 'brought' and the 14-day limit had therefore no application.

The learned judge upheld the preliminary objection on the first point. What the learned judge did here was to read into s 103 of the LPA the requirement that the Bar Council must be served *and* the Malaysian Bar should be made a respondent. His argument for this proposition is stated in his judgment at pp 12 and 13 of the appeal record:

> I would respectfully adopt the views of Mr Gordon and hold that when our O 53 r 2(3) provides that the notice of summons must be served on all persons directly affected it means that such persons are required to be made respondents to the proceedings. ...
>
> I would, at this point, interpolate to mention by way of explanation, that whilst the Bar Council is by definition the Central Council of the Malaysian Bar, established under s 47 of the Act, it is a purely executive body charged with the responsibility of the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions and not therefore a legal entity. Accordingly, it is *not* the Bar Council but the Malaysian Bar which must be made a respondent to the present appeal.

The learned judge was clearly persuaded by the view of Mr RJF Gordon in his book *Judicial Review: Law and Procedure*, at p 92 when discussing O 53 of the Rules of the Supreme Court. It is to be noted however that the English O 53 carries provisions for judicial review and is a liberalized version of O 53 of our Rules of the High Court 1980. Mr Gordon, when discussing O 53, was of the view that all persons 'directly affected' are required to be made respondents in the proceeding.

There is no denying that the learned judge made an in-depth study of the issue raised. One of the things which however cannot escape our attention in this regard is the fundamental principle affecting the right of a plaintiff to sue. Generally at common law a plaintiff is entitled to pursue his remedy against a defendant. He cannot be compelled to proceed against other persons whom he has no desire to sue. Prima facie, the plaintiff is entitled to choose the person against whom to proceed and to leave out persons against whom he does not wish to proceed. This principle was approved by Wynn-Parry J in *Dollfus Mieg Et Compagnir SA* v *Bank of England*.[1] One exception to this general rule was described by Buckley J in *McCheane* v *Gyles (No 2)*[2] at p 915:

> In a representative action — an action brought by one or more persons purporting to represent a class — one of the class may come forward and say, 'The plaintiff does not represent me. Add me as a defendant.' In that case the applicant may be added although the plaintiff objects.

Order 15 r 6(2) of the Rules of the High Court 1980 provides that at any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application —

> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

The rules give wide powers and a wide discretion to the court which it may exercise at a proper time. Buckley J applied the principle in *McCheane* v *Gyles*[2] where the defendant was a trustee sued for breach of trust desired to bring in the legal personal representative of a woman who had been his co-trustee. The head note to the case reads:

> G and C were the trustees of a settlement. C died, and X, his legal personal representative, lived in Ireland. M, the cestui que trust, brought an action against G, alleging a breach of trust by him and C, and claiming payment by G of the amount lost by the breach. A third-party notice, by which G claimed contribution from the estate of C, and the order giving leave to serve it on X in Ireland, were set aside by the Court of Appeal without prejudice to an application by G, under O XVI r 11, to add X as a defendant to the action: *McCheane* v *Gyles*, ante, p 287.
>
> On the application to add X being made, it was opposed by the plaintiff:
>
> Held, that X ought not to be added as a defendant against the plaintiff's wish.

Buckley J said at p 917:

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he 'ought to have been joined', or that his 'presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.'

Moser v *Marsden*[3] was an ordinary action to restrain an alleged infringement of the plaintiff's patent by the defendant Marsden. The manufacturer of the defendant's machine applied to be added as defendant alleging that the judgment in the action would injure him, and the defendant could not efficiently defend the action. On appeal Lindley LJ considered the principle and said at p 489:

> There may be a score of persons like Marsden using this particular machine, but there is no law or equity to oblige the plaintiff to sue all of them.

Referring to the rule under which the application was made His Lordship said:

> Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action? It appears to me that it does not.

In *Pegang Mining Co Ltd* v *Choong Sam & Ors*[4] the Privy Council held that the sublessees being parties to an agreement were necessary parties to any action brought to enforce the agreement. But the speech of Lord Diplock also emphasized the need for a 'flexibility of approach' in the exercise of the discretion of the court to add or substitute a party to an action.

The crux of the matter here is that since there is nothing to prevent any party interested to apply to the court at any stage of the proceeding to add the Bar Council (or the Malaysian Bar for that matter) as a defendant there is no reason whatsoever for the preliminary objection to be raised at this stage for it would be an exercise of futility for the court to answer the question raised in the objection since the discretion of the court is yet to be exercised at the proper time.

In *Wilson* v *Church*[5] one of the principal questions was whether a defendant (Church) was improperly joined and should be struck out as being only a formal defendant and made so for the purpose of discovery. When referring to the rule applicable (the equivalent of the first limb of our O 15 r 6(2)) Jessel MR said at pp 557-558:

> Now there is no doubt that the court may do so now because it may do it at any stage of the proceedings. If you came to the trial it would be absurd to strike him out, because you would dismiss the action. But what it means is this, if at any stage an application is made to strike him out, and it is proper to strike him out, of course the court will strike him out. In the same way, if there are parties who ought to have been joined, the court may order a plaintiff or defendant to be joined, or added. Then, if it is brought before the court at the proper time, and if it is in time, of course the court may do it if it thinks proper. But it is absurd to say that the court 'may' do so, if it did not mean that it was the duty of the judge to add the party if the proceedings were in such a state that the party could properly be added. The legislature were obliged to say 'may' because it might be at any stage of the proceedings.

The provision we are concerned with here, that is, s 103(3) of the LPA, already requires the Bar Council to be served. This is a provision in the nature of O 53 r 1(3) of the Rules of the High Court 1980 where the notice of the application for leave is required to be served on the Attorney General although he is not a party to the proceeding. The Bar Council is thus given adequate notice to be prepared and if necessary, to file an affidavit to express its views in order to protect its interest. It may even apply to be added as a party but that is entirely up to the Bar Council to decide. The argument on the distinction between the Bar Council and the Malaysian Bar may well be taken at that proceeding.

At the request of the Bar Council the court was reconvened on 29 October 1990 to hear further submission on the first preliminary point on behalf of the Bar Council. It was clear that by this time the Bar Council had changed its stand and it is now their argument that the Bar Council should not be made a party to the proceeding in this case.

It is the Bar Council's contention now that the position of the Bar Council in this context is akin to that of a subordinate tribunal. It is common practice that in an appeal against the decision of a subordinate tribunal the tribunal itself is never made a party to the proceeding. That is indeed a correct proposition in relation to appeals to the High Court from subordinate tribunals and it is never the practice in regard to appeals under O 55 of the Rules of the High Court 1980 to cite the subordinate tribunal as a party.

It is also the contention of the Bar Council that in the context of the decision appealed against the Bar Council was in the position of a judicial authority. The judgment of this court in *Yii Suok Ting* v *Sibu Municipal Council*[6] was cited. There it was a proceeding for mandamus and certiorari when leave had already been granted to challenge the decision of the Deputy Chairman of the Sibu Municipal Council in refusing to renew a permit to trade allegedly based on political bias and bad faith. The allegations of bias and bad faith were denied in the affidavit of the Deputy Chairman. The applicant applied for the attendance in court of the Deputy Chairman and one other official purportedly to cross-examine them on their affidavits. The High Court judge refused the application and this court dismissed the appeal and held that:

courts are unwilling to permit a person in a judicial position to be subjected to cross-examination as if he were a party to the proceedings.

That decision is of course based on the principle that the subordinate authority should not be made a party to the proceeding.

In *Squibb United Kingdom Staff Association* v *Certification Officer*[7] a similar application to cross-examine the certification officer in respect of his refusal to grant a certificate that an association was not an independent trade union under the UK Trade Union and Labour Relations Act 1974. What Lord Denning MR said at p 457 is quite relevant to get our perspective right in the present appeal:

> No doubt on any appeal there is a public interest involved. *So there should be someone present to support the decision of the certification officer.* In a criminal case the public interest is represented by the Crown. In one of these cases I think the public interest should be safeguarded by the Treasury Solicitor. The regulations provide that any party can be added such as the appeal tribunal thinks right. The Treasury Solicitor should be made a party and instruct counsel, not to represent the certification officer, but to represent the public interest. He should call any evidence which he thinks will be of assistance to the appeal tribunal and put forward any submissions which he thinks proper to be considered.
>
> It seems to me, therefore, that in future, instead of the Treasury Solicitor coming on behalf of the certification officer, he should come almost as a friend of the appeal tribunal to look into the facts and bring all material matters before the appeal tribunal. I do not suggest that the certification officer can never be called as a witness. He might be called, or his investigating officers might be called, so as to show what enquiries he made and what information he had before him; and he should produce any of the material which he considered. *But I do not think he should be regarded as an opposing party to be cross-examined on the validity of his reasons.* (Emphasis added.)

Finally s 103 of the LPA is a statutory provision for appeal. The appeal can be against the decision of the State Bar Committee *or* the Inquiry Committee or the Bar Council. But in every one of these appeals the Bar Council is required to be served with the documents. Section 103(3) requires only a literal reading and it is against all canons of construction to suggest that the subsection imposes a further requirement that the Bar Council be also made a party.

There is no doubt therefore that the action in the present case is properly constituted and non-citing of the Bar Council does not affect the validity of the action. The appeal on the first issue is accordingly allowed.

As regards the question of expiry of the period of appeal we agree with the conclusion of the learned judge that under s 103(1) of the LPA a complainant has 14 days from the date of receipt of the Bar Council's decision within which to appeal if he is dissatisfied with the decision. But there is no provision in the LPA for the court to enlarge time for this purpose. Since the time limited for appealing has long since expired, the appeal was not properly before the court. The appeal against the second issue is dismissed.

Since we have allowed the appeal on the first issue raised in the preliminary objection but dismissed the appeal on the second issue, we will not make any order as to costs in the appeal. Deposit to be returned to appellant.

Order accordingly.

Solicitors: *Meena Thayalan & Partners*; *Ong & Manecksha*; *VP Nathan & Partners*; *Sri Ram & Co.*

Reported by *Prof Ahmad Ibrahim*

Gapari bin Kitingan v Attorney General, Malaysia

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-52 OF 1990
ABDUL HAMID OMAR LP, AJAIB SINGH AND JEMURI SERJAN SCJJ
14 NOVEMBER 1990

Criminal Procedure — Letter of request for depositions to be taken outside jurisdiction for purposes of criminal proceedings in Malaysia — Applicability of Rules of High Court 1980 to criminal proceedings — Rules of the High Court 1980, O 39 — Courts of Judicature Act 1964, ss 3 & 16

Words and phrases — 'Cause' — Courts of Judicature Act 1964, s 3

This was an appeal from the decision of the High Court dismissing the appellant's application to set aside the ex parte order granting the application by the Attorney General of Malaysia for depositions of certain persons named in the application to be obtained in Hongkong and further order for the issue of a letter of request to be directed to the Supreme Court of Hongkong to request that court to take or cause to be taken the depositions of the said persons for the purpose of criminal proceedings in Malaysia.

Held, dismissing the appeal:

(1) By reason of s 16(a) of the Courts of Judicature Act 1964, the word 'cause' must necessarily be applicable to the rules of court made under the section. As 'cause' is defined in s 3 of the Act to include 'any criminal proceeding' the same meaning must be assigned to the word 'cause' in O 39 of the Rules of the High Court 1980. So viewed, O 39 should be applicable not only in respect of civil but also of criminal proceedings.

(2) Considered in the light of s 16(a) of the Courts of Judicature Act 1964, O 39 of the Rules of the High Court 1980 is therefore valid and properly enacted and the order is applicable to both civil and criminal proceedings. The learned judge had therefore not erred in law in making the order which he did and had acted intra vires.